

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1481

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

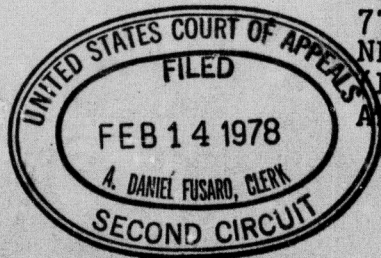
DOCKET NO. 77-1481

Bp/s

UNITED STATES OF AMERICA,
APPELLEE,
-VS-
ANDY CASTRO,
APPELLANT.

On Appeal From the United States District Court
For the District of Connecticut

BRIEF FOR APPELLANT



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STATUTES AND RULES INVOLVED

21 U.S.C. Section 841. Prohibited acts A--Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than \$15,000, or both. . . . Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

21 U.S.C. Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 32 Rules of Criminal Procedure

SENTENCE AND JUDGMENT

(c) Presentence Investigation.

(3) Disclosure.

Rules Continued

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

Rule 11 Local Rules of Criminal Procedure, District of Connecticut

It is hereby ORDERED that Criminal Rule 11, Re: Disclosure of Pre-Sentence Reports, of this District, is hereby amended to read as follows:

The Pre-sentence report shall be available for inspection by the defendant, or his counsel if he is so represented, and the attorney for the government two business days prior to sentencing at the United States Probation Office in or nearest to the city in which the sentencing is scheduled, subject to the following limitation:

In the preparation of pre-sentence reports, the Probation Officer's sentence recommendation and any information which he believes should not be disclosed to the defendant (such as diagnostic opinions which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons) shall be submitted on a separate page from the body of the

Rules Continued

report and marked "confidential." The sentencing judge in lieu of making the confidential page available, exclusive of the sentencing recommendation, shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence. The statement may be made to the parties in camera.

STATEMENT OF THE ISSUE

Did the sentencing judge act arbitrarily and abuse his discretion in imposing an eighteen month prison sentence upon appellant Castro when his codefendants Davies and Palter received sentences of one year and four months respectively?

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UNITED STATES OF AMERICA,

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-VS-

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

On June 29, 1977, a grand jury at Hartford returned a two-count indictment charging Daniel Scott Palter, Owen Bradley Davies and appellant Andy Castro with unlawful manufacture of amphetamine, a Schedule II controlled substance, in violation of Title 21 United States Code Section 841(a)(1)(Count One) and conspiracy to manufacture amphetamine and methaqualone in violation of Title 21 United States Code Section 846 (Count Two).

All three defendants previously had been arrested on a magistrate's warrant of arrest.

On September 27, 1977, appellant Castro and Palter each withdrew their previously entered pleas of not guilty and entered guilty pleas to Count Two. Count One was to be dismissed at the time sentence was imposed. On October 7, 1977, codefendant Davies also withdrew his previously entered not guilty plea and entered a plea of guilty to Count Two, the conspiracy count.

On November 17, 1977, appellant Castro moved pursuant to Rule 32(c)(3) of the Federal Rules of Criminal Procedure and Local Rule 11 of the United States District Court for the District of Connecticut, for disclosure of information appearing on the confidential page of his presentence report and of portions of his codefendants' presentence reports which specifically refer to the appellant. (App. 9) On November 21, 1977, in open court just prior to sentencing, the district judge stated:

... So I will disclose to all three attorneys that the discussions through the confidential pages and in the in-camera conference with the Court consists of almost what is in the Presentence Reports that have been available to counsel. I haven't compared the official statements word for word in each of the Presentence Reports but I think they're all identical with respect to the various alleged roles of the defendants.

As I recollect, the defendant Palter was more in the management type of situation,

he was there throughout the entire operation.

Davies was the chemist who was in the operation for awhile and left, came back, was not part of the Castro-Velazquez operation, and Castro was more in the selling end of the operation.

Nothing the Probation Officer told me varies from that, and there is nothing the Probation Officer told me with respect to roles that is not disclosed in the Presentence report. In other words, if you are concerned that there is some information that I have that differs from what you have read in the Presentence Report, clear your mind of that because that is not part of any record that I have seen or anything that has been disclosed to me.

(App.74-5) After hearing the presentations of counsel and after giving the appellant and his codefendants the opportunity to speak, the district judge imposed the following sentences: Appellant Castro, 18 months and 2 years' special parole; codefendant Davies, 12 months and two years' special parole; and codefendant Palter, 4 months and 2 years' special parole.

Appellant Castro is presently serving his eighteen-month term at the Federal Correctional Institution, Danbury, Connecticut. Timely notice of appeal was filed in the district court on November 23, 1977.

STATEMENT OF FACTS

The factual basis for the pleas of the three codefendants was presented by the government as follows:

MR. PICKERSTEIN: The government would prove that during the month of September, 1972, the defendant Palter met the defendant Davies in Brooklyn, New York. At this time, we will prove that Palter and Davies had a discussion concerning the manufacture of amphetamine.

We will prove that in April of 1973, the defendant Davies purchased a Parr Hydrogenator and various chemical precursors for amphetamine, using the name Poly-Chem Service Company, Westport, Connecticut.

We will prove that in May, 1973, the defendant Davies attempted to make amphetamine at Palter's apartment in Queens, but that this attempt failed.

We will prove that in June, 1973, Davies again attempted to manufacture amphetamine and again failed.

We will prove that in August of 1973, the defendant Davies moved in with the defendant Palter in New York City, storing his laboratory equipment with his parents in Redding, Connecticut.

We will prove that in July of 1973, the defendant Castro joined the group.

We will prove that Castro's function in the group was to distribute the amphetamine.

We will prove that in October and November, 1973, the defendant Davies successfully manufactured a quantity of amphetamines in Redding, Connecticut.

We will prove that the defendant Davies and the defendant Palter then diluted the amphetamine powder and made it into capsules, which they then sold to Castro who in turn sold the amphetamine in New York City.

We will prove that until the spring of 1974, Palter, Davies and Castro manufactured and distributed amphetamine producing a batch of amphetamine approximately once every two weeks.

We will prove that during this period of time,

Davies sold the amphetamines directly to the defendant Castro, who then distributed them. We will also prove that during this period of time, the ingredients and precursors were obtained using the name Poly-Chem Service Company.

We will prove that in June, 1976, Palter re-established contact with Davies and at this time the defendant Castro introduced his cousin, one Edgar Velazquez to the group.

We will prove that in September and October, 1976, Castro and Velazquez rented a house in Bridgeport, Connecticut and attempted unsuccessfully to manufacture amphetamine.

We will prove that in January, 1977, Velazquez rented a house located at 186 Cosey Beach Road, East Haven, Connecticut, for purposes of a laboratory to produce amphetamines.

We will prove that from January to April, 1977, Velazquez manufactured approximately one hundred grams of amphetamine a week which he then gave to defendant Castro who sold it. During this period of time we will prove that both Castro, Palter and Velazquez obtained a necessary precursor, lithium aluminium hydride, from SGA Scientific Corporation in New Jersey.

We will prove that in April, 1977, the defendant Davies attempted to purchase lithium aluminium hydride from Ventron Corporation in Massachusetts but that Ventron did not deliver the lithium aluminium hydride.

We will prove that during this entire period of time the sole purpose of Poly-Chem Service Company was to provide a corporation to establish the ingredients from amphetamine.

We will prove that on April 15, 1977, Davies telephonically contacted Ventron Corporation and inquired about amounts and prices for lithium aluminium hydride,

representing that he was from Poly-Chem Service Company, 186 Cosey Beach Avenue, East Haven. We will prove that on April 20, 1977, Davies, representing Poly-Chem Service Company, 186 Cosey Beach Road, East Haven, contacted Foote Mineral Company, Philadelphia, Pennsylvania, and inquired about lithium aluminium hydride.

We will prove that on April 19, 1977, representatives of Poly-Chem Service Company, East Haven, Connecticut, purchased solvents, including ether and alcohol.

We will prove that on February 23, 1977, Edgar Velazquez, representing Poly-Chem Service Company, had purchased ether and lithium aluminium hydride at SGA Scientific, Bloomfield, New Jersey.

We will further prove that on March 24, 1977, Velazquez purchased ten pints of ether for Poly-Chem Service from SGA Scientific.

We will prove that on May 11, 1977, the defendant Palter, using his own name and a personal check, purchased two hundred grams of lithium aluminium hydride at SGA Scientific, Bloomfield, New Jersey. Palter at this time, was accompanied by the defendant Castro, and they indicated that the name Poly-Chem Service was being changed to Thompson Research Company, 186 Cosey Beach Road, East Haven, Connecticut.

We will prove that on June 21, 1977, federal agents executed a search warrant at the premises located at 186 Cosey Beach Avenue, East Haven, Connecticut, and found the defendant Castro on the premises. The search of the premises disclosed a laboratory for the manufacture of amphetamine, and produced a quantity of amphetamine that had been manufactured there.

The government will also introduce a tape recording of a telephone conversation between Velazquez and the defendant Davies

wherein Velazquez inquires of Davies as to certain problems that he was having with the synthesis, and Davies gives him advice as to the synthesis.

The government will prove that on June 20, 1977, Palter and Castro met at the 186 Cosey Beach Road address in East Haven. We will show that they left the premises, and went to Macallister Bicknell Company in New Haven, where they purchased a quantity of O-toluidine. We will also show that they purchased a cylinder of chlorine gas. They then returned to the house. We will show that O-toluidine and chlorine gas are chemical precursors for methaqualone, a Schedule II. controlled substance.

We will show that when the search warrant was executed, stationery, bearing the name Thompson Research Company, 186 Cosey Beach Road, East Haven, Connecticut, and showing a billing address as Palter's address in New York. We will also show conversations on that date between Castro Palter and Velazquez concerning the manufacture of amphetamines.

Finally, the government will prove that lithium aluminium hydride is an essential ingredient to the manufacture of amphetamines, as is ether.

(App. 27-32)

At the time the government concluded its factual basis, appellant's counsel stated that Mr. Castro's entry into the conspiracy was June, 1976. Counsel then stated that Mr. Castro admitted purchasing chemicals but Mr. Castro denied actually "cooking these ingredients to make them into amphetamines." (App. 43)

At the time of imposition of sentence, the district judge had before him three men who all suffered from some form of

emotional disturbance. Appellant Castro presented psychiatric records and a report of C. Scott Grove, M.D., a psychiatrist practicing in New Haven who had examined him during the course of this case. (App. 15) Aside from his emotional problems, Andy Castro suffered from high blood pressure and an inoperable ulcer. He had earned over 90 credits at the City College of New York and was the youngest of the three at twenty-five years of age. (App. 90)^{1/} While Palter, a lawyer, and Davies, a scientist, were the products of white middle class families, Castro, whose family came from Puerto Rico, was a product of the most economically and physically devastated neighborhood in America, the South Bronx.

^{1/} The presentence reports of all three defendants are to be filed with the Second Circuit under seal at the time the government files its brief.

ARGUMENT

THE SENTENCING JUDGE ACTED ARBITRARILY AND ABUSED HIS DISCRETION IN IMPOSING AN EIGHTEEN MONTH PRISON SENTENCE UPON APPELLANT CASTRO WHEN HIS CODEFENDANTS DAVIES AND PALTER RECEIVED SENTENCES OF ONE YEAR AND FOUR MONTHS RESPECTIVELY.

Andy Castro was the youngest of the three codefendants. His role in the conspiracy, according to the official version of the presentence report which is available to this Court under seal, was that of distributor of the amphetamine. Like Davies and Palter, he had no prior convictions. Palter was the financial manager of the operation. Davies, the scientist, provided the formula for the manufacture of amphetamine. Edgar Velazquez, who was Castro's cousin, was the co-conspirator who actually performed the laboratory operation for the manufacture of the controlled substances and had rented the house at 186 Cosey Beach Avenue, East Haven, where the laboratory was located. Velazquez was granted transactional immunity in return for his cooperation with the government.

This Circuit recognizes that "substantial disparities in sentences exist and that they are of serious concern to those involved in the judicial system" United States v. Robin, 545 F.2d 775, 782 (2d Cir. 1976). See Partridge, The Second Circuit Sentencing Study (1974) at A-18; Orland, Justice in Sentencing (1974) at 157-198. In United States v. Kaylor, 491 F.2d 1133 (2d Cir. 1974)(en banc), the Second Circuit recognized:

Any number of other circuits have similarly vacated sentences when imposed for arbitrary reasons or where discretion has either not been exercised, United States v. Wilson, 420 F.2d 495 (4th Cir. 1971); United States v. Daniels, 446 F.2d 967, 971-72 (6th Cir. 1971), or where it has been improperly exercised. E.g., Woosley v. United States, 478 F.2d 139, 147 (8th Cir. 1973)(en banc).

491 F.2d at 1141.

While Palter's cooperation with the government after his arrest may have provided Judge Zampano with a basis for giving Palter a shorter term than Castro, but cf. United States v. Garcia, 544 F.2d 681 (3d Cir. 1976), there was no such discernible difference in the case of Davies. Although Davies, just prior to sentencing, did sit down and speak with agents of the Drug Enforcement Agency, the sentencing judge correctly observed "I don't think the government learned very much from Mr. Davies." (App. 110) Appellant Castro did offer his cooperation, but the Assistant United States Attorney informed counsel that "there wasn't much Mr. Castro could do for him." (App. 92) The sentencing judge attempted to draw a distinction between Castro and Davies by observing that Castro had the profit motive, while Davies did not. (App. 109) However, there can be no question about the fact that without Palter's management, Davies' formula and Velazquez's actual manufacturing, Andy Castro would never have been given amphetamine to sell. Castro's motivation was not profit; it was survival. Since 1975, he has been suffering from anxiety,

depression, confusion and insomnia. His family was destitute, and he joined the conspiracy at the behest of Palter to help sustain himself. Davies, a scientist, and Palter, a lawyer, had economic and educational advantage which appellant Castro did not.^{2/} At the bottom line, there was nothing before the district court which could have justified giving appellant Castro a sentence which was one and one half times greater than Davies, who supplied the formula and the technical information. In imposing two such disparate sentences, the sentencing judge acted arbitrarily and abused his discretion.

In United States v. Wiley, 278 F.2d 500 (7th Cir. 1960), the Seventh Circuit, in remanding the case to the district court, ruled that where a district judge singles out a particular defendant and imposes a more severe sentence for no discernible reason, an appellate court should not hesitate to correct the disparity by exercising its supervisory power over the district court. The exercise of this supervisory power is necessary to the proper administration of justice. Cf. LaBuy v. Howes Leather Co., 352 U.S. 249, 252 (1957)(mandamus). Wiley, who had no prior record and was an accessory, received a three-year sentence while the principal who had four prior felony convictions received two years, and the remaining codefendants received one year and a day each. While the Seventh Circuit was at least as concerned with the sentencing judge's policy of punishing Wiley's exercise of his right to jury trial,

^{2/} In any event, Palter's profit motive cannot be doubted.

that Court was also moved to act to correct the disparity problem created by the district court's policy of deterring jury trials. In United States v. Daniels, 446 F.2d 967 (6th Cir. 1971), the Court took the extraordinary action, where the sentencing judge refused to consider the individual characteristics of the defendant in arriving at a sentencing decision, of not only vacating the sentence but also placing the defendant on probation on its own authority.

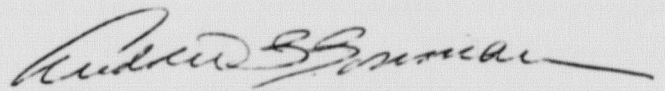
The Fourth Circuit has also dealt with the problem of disparate sentences among codefendants by remanding for resentencing the case of a male bank robber who received a longer sentence than his female codefendant where the sentencing judge justified the disparity on the basis of sex. United States v. Maples, 501 F.2d 985 (4th Cir. 1974). While the Maples court specifically recognized that a disparity in age among codefendants may, in a proper case, support disparate treatment in sentencing, it could not have intended or envisioned that the appellant Castro, who was the youngest among the three and had no prior record of convictions, would have been singled out in the present case for a more severe sentence.

This case should be remanded for resentencing before a different judge. See United States v. Stein, 544 F.2d 96 (2d Cir. 1976), and United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973).

CONCLUSION

Appellant Castro's case should be remanded for resentencing before a different judge, since his disparate eighteen-month sentence, which exceeded codefendant Davies' sentence by six months for no discernible or proper reason, was arbitrary and constituted an abuse of discretion.

Respectfully submitted,



Dated: February 14, 1978

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CERTIFICATION

I HEREBY CERTIFY that two copies of the foregoing Brief and Appendix for Appellant Andy Castro were mailed to H. James Pickerstein, Esq., Chief Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508; and one copy of the Brief and Appendix was mailed to Sheila Ginsberg, Esq., Phillips, Nizer, Benjamin, Krim & Ballon, 40 West 57th Street, New York, New York, 10019; this 14th day of February, 1978.

